

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE UPPER DECK COMPANY,

Plaintiff,

v.

RYAN MILLER et al.,

Defendants.

CASE NO. C23-1936-KKE

ORDER ON DISCOVERY DISPUTES

This matter comes before the Court on the parties' joint discovery dispute statements. Dkt. Nos. 76, 78. The Court held a status conference and heard from both parties on the discovery disputes. Dkt. No. 81. The Court will first memorialize its oral rulings regarding Plaintiff's response to Defendants' interrogatories ("Rogs") and requests for admission ("RFAs"). The Court will then issue its order on Plaintiff's objections to Defendants' requests for production ("RFP"). The Court ends this order with a reminder to the parties about its expectations regarding professionalism and cooperation.

I. THE FIRST DISCOVERY DISPUTE

The first joint discovery dispute statement concerns Plaintiff's responses to Defendant Miller's Rogs 1–5, 7–8; Defendant Ravensburger's Rogs 3, 5, 7–11; and Defendants' RFAs 5 and 6. Dkt. No. 76. As stated on the record, the Court ORDERS as follows:

- Miller Rog 2: Plaintiff shall amend this response to specifically identify the work product they allege was disclosed.

- 1 • Miller Rog 3: Plaintiff shall amend this response to more fully describe what acts
2 each “milestone” included and the specific tasks that are “being redone.” Plaintiff
3 should also add more detail about the current schedule for the release of Rush of
4 Ikorr.
- 5 • Miller Rog 4: Plaintiff’s counsel shall confirm that the only delay in production
6 occurred in April 2023.
- 7 • Miller Rog 7: Plaintiff shall amend this response to list the specific contract(s) and
8 provision(s) it alleges were breached.
- 9 • Miller Rog 8: Plaintiff shall amend this response to describe categories of damages
10 and the parties shall meet and confer after that amendment to determine what
11 additional information, if any, is needed and appropriate for this stage of litigation.
- 12 • Ravensburger Rog 5: Plaintiff shall amend this response to include dates of new
13 drafts of the relevant “Ability,” if any, and shall confirm the “expression” column
14 of its table accurately describes how each relevant “Ability” interacts with the other
15 aspects of the game.
- 16 • Ravensburger Rog 7 and Rog 10: Plaintiff shall amend these responses to identify
17 the confidential or proprietary information it alleges has been incorporated into
18 Lorcana.
- 19 • Ravensburger Rog 8, Rog 9, Rog 11: Plaintiffs shall amend these responses in
20 accordance with FRCP 33(d) once responsive documents are produced.
- 21 • Defendants’ RFA 5 and RFA 6: the parties are instructed to meet and confer in an
22 effort to agree on an understanding of the term “artwork” as used in these requests.
23 Plaintiff shall then amend its response.

24 Under Federal Rule of Civil Procedure 33(d), all parties are reminded that any responses
to Rogs that refer to business records must specify by Bates number the records that are responsive
to the Rog.

Plaintiff’s remaining responses to the identified Rogs are sufficient. Plaintiff shall amend
its responses to these Rogs and RFAs by January 10, 2025. If any of Plaintiff’s responses utilize
FRCP 33(d), they must be updated within seven days of Plaintiff’s corresponding production to
list the specific Bates numbers. Plaintiff is reminded of its duty to supplement these responses to
the extent new information becomes available. Fed. R. Civ. P. 26(2)(E).

II. THE SECOND DISCOVERY DISPUTE

In the second joint discovery dispute statement, Defendants complain of Plaintiff's objections to certain RFPs. Dkt. No. 78. The Court ORDERS as follows:

- RFP 1: Plaintiff shall amend its response (and corresponding production) to include documents that relate to Miller.
- RFP 2: Plaintiff shall amend its response (and corresponding production) to include documents that relate to Lorcan.
- RFP 9: Plaintiff shall amend its response (and corresponding production) to include agreements regarding Rush of Ikorr that Plaintiff entered with third party game designers who attended the 2018 summit.
- RFP 10: Plaintiff shall amend its response (and corresponding production) to include communications that mention any other agreements between the parties, besides the 2018 Summit Agreement and the Work for Hire Agreement, to the extent such agreements exist. If no other agreements exist, Plaintiff does not need to amend its response other than to confirm the absence of any additional agreements.
- RFP 20¹: Plaintiff's counsel represented that this production will include more than a written report. Thus, Plaintiff shall amend its response to more accurately reflect the documents relating to damages it intends to produce.
- RFP 24, RFP 25, and RFP 26: Plaintiff shall amend its responses (and corresponding productions) to include documents that relate to each copyright.
- RFP 27: Plaintiff shall amend its response (and corresponding production) to include documents that relate to Miller's termination of the Work for Hire Agreement.
- RFP 31: Plaintiff shall amend its response (and corresponding production) to include documents that relate to any "false, misleading, deceptive statements [or] partial disclosures of fact relating to the termination of [Ryan Miller's] relationship with Upper Deck and the commencement of his relationship with Ravensburger" as alleged in Paragraph 64 of the Second Amended Complaint.

Plaintiff shall amend its responses to these RFPs by January 10, 2025.

¹ At the hearing, Defendants raised concerns with RFPs 17–19. These were not included in the joint discovery dispute statement so the Court will not address them.

1 The remaining identified RFP responses are sufficient but to the extent the document
2 production does not comport with the response, Defendants can reraise these concerns in another
3 joint discovery statement after meeting and conferring with Plaintiff.

4 Defendants also preemptively dispute the adequacy of Plaintiff's forthcoming document
5 production. Such disputes are not ripe for the Court's consideration. Accordingly, the Court
6 instructs the parties to meet and confer after Plaintiff completes its production and Defendants can
7 reraise any disputes in another joint discovery statement, if necessary.

8 Regarding the ESI protocol dispute, it is difficult to imagine how Plaintiff will meet its
9 discovery obligations (especially regarding documents that "relate to" different topics) without
10 keyword searching, which is best managed through an ESI agreement. Courts in this district have
11 repeatedly emphasized the importance of both initial self-searching by a party (as Plaintiff
12 proposes) followed up by a more comprehensive digital search. *See, e.g., Benanav v. Health Paws*
13 *Pet Ins.*, No. C20-00421-LK, 2022 WL 3587982, at *3 (W.D. Wash. Aug. 22, 2022) ("[I]t is typical
14 for a party to conduct a prompt initial search for 'low-hanging fruit' and later perform a more
15 comprehensive search based on negotiated search terms." (cleaned up)). Courts have likewise
16 detailed the risks inherent in self-searching alone. *Id.* at *4 ("[P]arties and counsel that embark on
17 self-collection can soon encounter multiple pitfalls that can sidetrack the litigation and lead to
18 motions to compel, spoliated evidence, and even sanctions.") (collecting cases); *see also Tera II,*
19 *LLC v. Rice Drilling D, LLC*, No. 2:19-CV-2221, 2022 WL 1114943, at *4–5 (S.D. Ohio Apr. 14,
20 2022) (noting that self-collections by document custodians tend to give rise to "questions
21 regarding the accuracy and completeness of collections if directions and oversight by legal counsel
22 or forensics experts are poor or non-existent," and that "[t]hese problems with self-collection may
23 be counteracted with a systematic procedure for producing documents") (quoting *The Sedona*
24

1 *Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing*
2 *Electronic Document Production*, 19 SEDONA CONF. J. 1, 167 (2018)).

3 At this juncture, the Court will not order Plaintiff to enter any particular ESI agreement but
4 directs Plaintiff to ensure it is taking all appropriate steps to meet its discovery obligations,
5 including with respect to the preservation and identification of electronically stored information.
6 To the extent any party's document production is inconsistent with the Federal Rules or this order,
7 the Court may order the parties to exchange search terms, custodians, date ranges, and other
8 pertinent discovery search protocol information to ensure that all responsive documents are
9 identified.

10 III. GENERAL CONDUCT

11 Plaintiff represented to the Court that it would produce 15 categories of documents by
12 December 23, 2025, and would complete its production of documents in response to Defendants'
13 first RFPs by January 24, 2025. It is the Court's expectation that these dates are firm.

14 At Plaintiff's request, the Court clarifies that the timing requirements under Local Civil
15 Rule 37(a)(2) do not apply to this Court's discovery dispute procedure. That said, the Court
16 expects the parties will provide a reasonable amount of time in which to respond to a proposal for
17 a joint discovery statement. The purpose of the Court's discovery dispute procedure is to
18 encourage communication between the parties, crystallize discovery disputes, and provide
19 expedited access to the Court for a hearing and prompt resolution of discovery issues. This process
20 is intended to save the parties time and resources, as well as promote judicial economy, by keeping
21 discovery moving and avoiding protracted briefing on discovery disputes. The success of this
22 procedure depends upon the parties' good faith participation and recognition of these aims.

1 To that end, the parties are reminded to continue to work together, confer in good faith,
2 and exhibit civility and professional courtesy with respect to the tone and content of any
3 communications.

4 Dated this 18th day of December, 2024.

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Kymberly K. Evanson
United States District Judge